

FEDERAL MAGISTRATES COURT OF AUSTRALIA

TRAN v MINISTER FOR IMMIGRATION

[2004] FMCA 709

MIGRATION – Spouse visa – application dismissed.

Migration Act 1958 (Cth)

Migration Regulations 1994

Nassouh v Minister for Immigration and Multicultural Affairs (2000) FCA 788

VAT v Minister for Immigration & Multicultural & Indigenous Affairs (2004)
FCAFC 255

Applicant: THI O. TRAN

Respondent: MINISTER FOR IMMIGRATION &
MULTICULTURAL & INDIGENOUS
AFFAIRS

File No: MLG 1385 of 2003

Delivered on: 19 October 2004

Delivered at: Melbourne

Hearing Date: 7 October 2004

Judgment of: McInnis FM

REPRESENTATION

Pro bono Counsel for the
Applicant: Mr J. Belbruno

Counsel for the Respondent: Ms J.K. Macdonnell

Solicitors for the Respondent: Australian Government Solicitor

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

MLG 1385 of 2003

THI O. TRAN
Applicant

and

**MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIGENOUS AFFAIRS**
Respondent

REASONS FOR JUDGMENT

1. By an application filed on 12 August 2003 Thi O. Tran (the applicant) seeks to review a decision of the Migration Review Tribunal, the MRT, delivered on 17 July 2003. The MRT decision had affirmed an earlier decision of a delegate of the Minister refusing to grant a partner temporary class UK visa, subclass 820 (spouse). The original delegate's decision was made on 5 April 2002.
2. The application before this court, though filed in the Federal Court, was subject to an order transferring the application to this court by order made of Marshall J on 28 November 2003. In the application before this court the applicant has relied upon the application which briefly referred to the statement of grounds as follows:
 - i) 1. The Respondent failed to observe the proper procedures with regard to the Applicant and to act in accordance with substantial justice.

- ii) 2. The Respondent exceeded its jurisdiction.
3. The applicant relied upon and adopted contentions of fact and law filed 11 November 2003. The respondent relied upon and adopted the respondent's contentions of fact and law filed 17 December 2003, together with further written submissions entitled Respondent's Submissions At Hearing.
4. The application in the present case is governed by the provisions of the *Migration Act 1958* (the Act) and the *Migration Regulations 1994* (the Regulations). In particular, the following apply:
5. Item 1214C of schedule 1 to the regulations;
6. Part 820 of schedule 2 to the regulations (subclass 820.211(2) and
7. 820.221(1)); and
8. Regulation 1.15A.
9. By way of background, it is noted that there is little in dispute in terms of the background of the applicant which appears to be appropriately set out in the respondent's contentions of fact and law. The applicant is a female national of Vietnam born on 30 December 1956. The applicant entered Australia on 1 September 1999. She then applied for permanent residence on spouse grounds on 10 May 2000. The applicant was nominated by Tri Nhan Thien Han (the nominator) an Australian citizen who was born in Vietnam.
10. The applicant was previously involved in a de facto relationship with Thoi Ngoc Le. There are four children from that relationship. The nominator was previously married to Ngoc-Lieu Nguyen. There are four children from that relationship living near to the nominator. The applicant met the nominator in Australia in October 1999 at her daughter's house. On 14 February 2000 the nominator proposed marriage and they married in Australia on 25 April 2000. The parties moved into the house of the applicant's daughter in Gertrude Street, Fitzroy in mid-April 2000. The parties signed a lease for the house. The applicant and nominator have a joint bank account, but the MRT found that the parties' accounts of their financial relationship to be inconsistent and unconvincing.

11. The MRT noted the existence of the nominator's will in which the applicant was the main beneficiary and international transfers from the nominator to the applicant's son. However, the MRT was not satisfied that the nominator actually contributed to the funds sent to the applicant's children. The MRT was not persuaded that there was a genuine reason for the applicant to enter into a lease with her son-in-law. It found that the lease suggested the relationship between the applicant's son-in-law and the nominator was a business arrangement rather than a family relationship. The MRT found that the lease arrangements implied a lack of trust between the applicant's son-in-law and the nominator. The MRT also stated it gave little weight to the parties' evidence on this issue.
12. It was found by the MRT that it was clear from the evidence that the applicant had not met the nominator's children and that the nominator had gone out of his way to avoid such a meeting. The MRT concluded that the applicant's lack of knowledge or interest in the nominator's children suggested neither family had fully embraced the parties' relationship.
13. The applicant had stated that the nominator bought her a \$9000 bangle for her third anniversary. The MRT found there was no evidence that the nominator earned sufficient money to pay for the gift. It gave little weight to the evidence regarding the bangle as it was not satisfied on the evidence provided that the nominator purchased the bangle.
14. Due to the inability of the applicant's daughter and son-in-law to give an account of the daily routine or lifestyle of the nominator, the MRT was not satisfied that the nominator resides at the Gertrude Street house on a 'genuinely domestic' basis with the applicant. The MRT concluded on the evidence that the applicant had entered into a business arrangement with the nominator to enable her to apply for permanent residency in Australia, but concluded that such an arrangement would have had the support of the applicant's daughter and son-in-law as they would benefit from the presence of the applicant in Australia.
15. In drawing its conclusion the MRT gave significant weight to the contrived lease which demonstrated the commercial nature of the relationship between the nominator and the applicant's family. The

MRT also considered the evidence relating to the parties' financial relationship which it found did more to prove the lack rather than the existence of joint financial obligations. The MRT gave significant weight to the 'deliberate and total segregation' of the applicant's and nominator's families. Little weight was given to the evidence of the gift of the bangle to the applicant and therefore the relationship between the parties was not considered to a genuine spousal relationship as defined in regulation 1.15A.

16. In its decision the MRT referred to regulation 1.15A and correctly, in my view, refers to the test for determining whether one person is the 'spouse' of another person, whether in a married or de facto relationship. The MRT correctly referred to the Federal Court decision in *Nassouh v Minister for Immigration and Multicultural Affairs* (2000) FCA 788 where it was held that subregulation 1.15A(3) set out mandatory considerations. The MRT, in my view, otherwise referred correctly to other relevant authorities.
17. The applicant in the contentions of fact and law adopted at this hearing referred to a number of contentions which it was claimed support the application. It is not necessary for me to list each and every one of the items referred to, save and except that it is clear that the main complaint in this application was a failure on the part of the respondent to observe procedures required under the Act in that it failed to prepare a statement of reasons in compliance with the Act and/or failed to act according to substantial justice and the merits of the case as required by the Act. Specifically, it was asserted that the law requires the decision to be sufficiently transparent as to be capable of review, and to do this reasons must advert to such material questions of fact and findings as are raised on the case in the case put to the decision-maker.
18. It was submitted that where the MRT fails to provide such a statement an inference may be drawn that it addressed the wrong issue, asked itself a wrong question, relied on irrelevant material or ignored relevant material. It was further suggested that in the present case where conclusions of fact are concerned the MRT's advantage of seeing and hearing witnesses does not explain the decision and that the advantage has not been used or has been misused.

19. Other issues were raised in relation to interpretation and application of law in the context of the MRT's conclusion that there was not in fact a genuine relationship, or to put it another way, drawing a negative inference as to the genuineness of the relationship from the presence of evidence that it was submitted would normally have probative value in favour of the applicant.
20. It is clear from the MRT decision that in the course of considering the material it had the advantage at the hearing on 4 June 2003 to consider the evidence of the applicant, the applicant's daughter and son-in-law and the nominator. It also considered a significant volume of documents which it refers to and lists in some detail.
21. I refer to the documents which appear in paragraph 18 of the MRT decision as follows:-

“18. Evidence submitted to the Tribunal in support of the review application included:

- *Joint bank account statements in the name of the parties dated April 2000 to November 2000 and April 2002 to June 2002 and addressed to the residence in Fitzroy*
- *Receipt for household goods*
- *Will in the name of the nominator naming the review applicant as his beneficiary*
- *Two statements in support*
- *Rental property agreement in the name of the parties for a resident in Fitzroy dated 15 March 2000*
- *Life insurance in the name of the parties effective from 20 November 2001*
- *Mail to the parties at a resident in Fitzroy*
- *Electricity account in the name of the parties for a residence in Fitzroy dated July 2000 and August 2000*
- *Gas accounts in the name of the parties for a resident in Fitzroy dated March 2002, January 2002, November 2001, July 2000 and May 2002*
- *A hotel receipt dated 26 April 2002 in the name of the parties*

- *Telephone account in the name of the parties for a residence in Fitzroy dated August 2000*
- *Cards and invitations to the parties*
- *Receipts for jewellery, cake and dinner and an untranslated receipt*
- *Money transfer receipts in the name of the parties to a Le Ngoc Thanh in Vietnam*
- *Mail to the nominator at a residence in Fitzroy*
- *Invoice statements in the name of the parties and brochures from Amway dated January 2002 to August 2002*
- *A photograph album”*

22. The respondent submits that in the present case there is no demonstrable failure to deal with a legislative ground or individual criterion or any element thereof which would constitute jurisdictional error in the MRT's decision-making function.

23. In considering the issue of jurisdictional error I adopt and apply the following passage from the Full Court of the Federal Court decision in *VAT v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) FCAFC 255 where the Court states:-

“16 It is not disputed by the appellants that in order to find jurisdictional error this Court should rely on the description of what constitutes jurisdictional error as it appears in Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2; (2003) 211 CLR 476 and in particular on the statement in Minister for Immigration & Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323 at [82] citing Craig v State of South Australia (1995) 184 CLR 163. That requires the appellants to establish that the Tribunal fell into error of law by identifying a wrong issue, asking itself a wrong question, ignoring relevant material, relying on irrelevant material or, at least in some circumstances, making an erroneous finding or reaching a mistaken conclusion. To this may be added denial of procedural fairness: Minister for Immigration & Multicultural & Indigenous Affairs v SGLB [2004] HCA 32; (2004) 207 ALR 12 per Gummow and Hayne JJ at [49], footnote 26 referring to Re Refugee Review Tribunal; Ex parte Aala [2000] HCA

57; (2000) 204 CLR 82 and Re Minister for Immigration & Multicultural Affairs; Ex parte Miah [2001] HCA 22; (2001) 206 CLR 57.”

24. It was submitted that in the present case essentially the complaint is one which addresses what might be described as factual errors or failure to give sufficient weight to matters advanced for and on behalf of the applicant. It is otherwise submitted by the respondent that where it may be asserted that the MRT has failed to make further inquiries, that in the present circumstances there is no failure of a kind which would attract judicial review; that is, no failure of a kind which would lead this court to conclude that there has been jurisdictional error.
25. Similarly, the respondent submits that any suggestion of a failure to prepare a statement of reasons to comply with the Act should be rejected and it is asserted that the statement of reasons provided adequately provides an appropriate analysis of the facts in this difficult application where the MRT of course is required to reach a decision based upon the material before it. I accept in the circumstances that the MRT in considering an application of this kind is not required to specify each and every fact asserted and/or analysed in precise detail all of the matters presented to it for its consideration.
26. Having carefully considered the material before the MRT and its reasoning and applying the principles of law to which I have referred following the High Court decision in S157, it is my view that there is no demonstrable jurisdictional error in this present application. The finding by the MRT after analysing both the documentary material and the evidence before it that it was not satisfied that there was a genuine and continuing relationship for the purposes of the appropriate regulation, in my view, is a finding reasonably open to the MRT, and in its reasons it has carefully and appropriately considered the appropriate evidence as it is bound to do under the legislation.
27. I cannot see from the material before me any or any proper basis upon which it could be claimed that there has been jurisdictional error in the reasoning process and/or in the manner in which the MRT has approached its task. It has, in my view, referred correctly to the appropriate legislation and regulations and has otherwise applied

appropriately and correctly the relevant principles of law. The mere fact that it has arrived at a conclusion which is at odds with the assertion of the applicant and supporting witnesses and evidence does not of itself justify judicial intervention in an application of this kind, and nor does it provide a basis upon which this court can find there has been jurisdictional error.

28. I otherwise accept the contentions on behalf of the respondent that in this application there is in fact no basis upon which the application should succeed. Accordingly, it is appropriate that the order of the court be that the application is dismissed and the applicant pay the respondent's costs.

I certify that the preceding twenty-four (24) paragraphs are a true copy of the reasons for judgment of McInnis FM

Associate:

Date: 19 October 2004